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MINUTES OF THE BOARD OF SUPERVISORS
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Violet Varona-Lukens, Executive Officer
Clerk of the Board of Supervisors
383 Kenneth Hahn Hall of Administration
Los Angeles, California 90012

Chief Administrative Officer
County Counsel

At its meeting held July 5, 2005, the Board took the following action:

5

Supervisor Antonovich made the following statement:

"Last week, the United States Supreme Court issued a 5-4 decision that expands the use of eminent domain proceedings beyond the taking of private property for 'public use.' The decision in Kelo v. City of New London allows local governments to take private property when the sole purpose is economic development, irrespective of whether or not the subject property is in any way blighted or economically disadvantaged.

"Because California law requires additional findings of blight for eminent domain proceedings, the decision may embolden a city or developer to claim that the Court's decision supersedes California law.

"Among the diverse coalition supporting the property owners in the case, were the NAACP, the AARP, the National Taxpayers Union and the Southern Christian Leadership Conference.

"In her dissent, Justice Sandra Day O'Connor wrote that this was a case of 'reverse Robin Hood' – 'take from the poor, give to the rich.' She said, 'beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.'

"Justice Clarence Thomas labeled the decision 'a government land grab' that will be used against 'politically weak communities with high concentrations of minorities and elderly.'

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> "Eminent domain should be used both sparingly and judiciously, as the government's seizure of an individual's property is a serious matter, one that has a tremendous potential for hardship on the property-owner. While the taking of private property for a road, library, school or other infrastructure that is needed for the common good has obvious public benefits, the public benefit of taking of private property solely in the name of 'economic development' is wrong.
>
> "The Court's decision is of greater concern given the wide publicity surrounding abuses of eminent domain authority by cities and counties throughout the Country."

Therefore, on motion of Supervisor Antonovich, seconded by Supervisor Yaroslavsky unanimously carried, the County Counsel and Chief Administrative Officer were directed to review the Kelo v. City of New London (Kelo) decision to determine if legislation is required at the Federal and/or State level to protect the rights of private property-owners; research the impact of the Kelo decision on eminent domain proceedings in cities and counties in California; and determine if a County Charter amendment can be made to protect property owners.

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Copies distributed:
Each Supervisor

Varona Rukens

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DAVID E. JANSSEN
Chief Administrative Officer

August 15, 2005

To: Supervisor Gloria Molina, Chair
Supervisor Yvonne B. Burke
Supervisor Zev Yaroslavsky
Supervisor Don Knabe
Supervisor Michael D. Antonovich

From: David E. Janssen
Chief Administrative Office

Raymond G. Fortner, Jr.
County Counsel

REVIEW AND ANALYSIS OF KELO DECISION ON EMINENT DOMAIN

At its meeting of July 5, 2005, the Board instructed our offices to review the Kelo v. City of New London (Kelo) decision to determine if legislation is required at the Federal or State level to protect the rights of private property owners; research the impact of the Kelo decision on eminent domain proceedings in cities and counties in California; and determine if a County Charter amendment can be made to protect property owners.

This memo discusses the legal implications of Kelo, examines whether there are sufficient protections under existing California statute to protect private property owners, and analyzes legislation recently introduced in Sacramento and Washington, D.C. in response to Kelo. The memo also incorporates information and analyses from the Community Development Commission.

Background: Legal Implications of Kelo v. City of New London

In the recent Kelo decision, the U.S. Supreme Court upheld the authority of local governments to use the power of eminent domain for the purposes of private development, however, the Kelo case does not, in and of itself, change the law of eminent domain in California or expand the existing condemnation authority of cities and counties.

The Kelo case involved a Connecticut statute which authorized municipalities to condemn private property for economic development unrelated to the elimination of blight. In affirming the City of New London's right to condemn private property

under this statute, the Supreme Court ruled that economic development, unrelated to the redevelopment of blighted areas, constitutes a valid "public use" under the 5th Amendment of the United States Constitution.

The 5th Amendment is a limitation on the states' power of eminent domain and requires that private property may only be condemned for a "public use" and upon payment of "just compensation".

In California, municipalities, as opposed to the State itself, have no inherent power of eminent domain. Cities and counties are authorized to condemn property for a particular use only if the Legislature has enacted a statute that authorizes the city or county to condemn property for that use.

California's Community Redevelopment Law authorizes condemnation of private property in the exercise of special powers to redevelop blighted areas. However, unlike Connecticut, California does not have a statute that authorizes a municipality to condemn private property for economic development unrelated to the redevelopment of blighted areas.

As the Supreme Court discussed in the Kelo decision, the condemnation of private property for purposes of redeveloping blighted areas had already been deemed to be a valid public use under the 5th Amendment in the prior Supreme Court case of Berman v. Parker, in 1954.

Accordingly, the Kelo case does not affect the current state of the eminent domain law in California and would impact eminent domain proceedings by cities and counties only to the extent that it prompts the Legislature to change state law.

Existing Statutory Protections

California has extensive laws governing eminent domain, but it is used for economic development mainly by redevelopment agencies charged with removing urban blight. AB 1290 (Isenberg), attempted to tighten the definition of conditions which constitute blight for projects adopted after the bill's 1993 passage. AB 1290's reforms stipulated that a blighted area is predominantly urbanized and characterized by physical and economic blighting conditions, both of which must be present. Physical blight includes unsafe or unhealthy buildings and factors that substantially hinder or prevent economic use or development. Economic blight includes such things as depreciated or stagnant property values, abnormally high business vacancies, and a high crime rate.

The identified blighting conditions must render a redevelopment area substantially underutilized such that it constitutes a serious physical and economic burden on the local government not reasonably likely to be reversed by government or private action without redevelopment.

AB 1290 imposed a 12-year limit on the use of eminent domain for projects adopted before its passage, seemingly limiting its use to the early years of a project. However, extensions are permitted by redevelopment plan amendment. Some amendments (adding area, extending time, or dollar limits) require a process similar to new project adoption, including blight findings.

Redevelopment agencies have contended that amending a plan to add or extend eminent domain does *not* warrant new blight findings. They read Health & Safety Code §33368 as declaring that blight is "conclusively presumed" for purposes of any redevelopment actions in connection with a project area. This reasoning was rejected in a recent appellate ruling, Boelts v. City of Lake Forest[1], which on the specific facts of the case held that reliance on a conclusive presumption was unjustified. Although Boelts suggests limits on use of eminent domain against unblighted property, it is probably limited by its particular facts. Whether (or to what extent) a "conclusive presumption" that a redevelopment area is blighted should govern later uses of eminent domain seems ripe for legislative clarification.

At the State level, statutory protections work only until a statute is amended or diluted and definitions are revised. The pursuit of additional local revenues guarantees that there will continue to be proposals to weaken or dispense with a narrow definition of blight. Doing so enables expanded, or extended projects, or a financing source for new public purposes such as transit villages and harbor development. In addition, many pre-AB 1290 projects are due to end in 2009, and redevelopment agencies are seeking to extend projects and maintain tax increment diversion. Current law allows for extensions of projects with a limited showing of blight, but the diversion of tax increment from unblighted areas is a financial drain on all levels of government.

Since the AB 1290 reforms there have been numerous attempts to modify its protections including changes to the definition of blight and limits on project duration. There are ample examples in the current legislative session, all of which are opposed by the County. SB 521 would amend the definition of blight to define "lack of high density development within a transit village development district" as an economic blight condition. AB 1472 would permit project-tax diversion extensions in City of San Jose areas admittedly not meeting the

[1] (2005) 127 Cal. App. 4th 116. The California Supreme Court refused review and a request to de-publish the decision.

definition of physical blight. AB 1330 sought a tailored "blight" definition to enable tax diversion from Port of Los Angeles trust lands to fund a San Pedro harborside development. AB 1167 would fund an El Monte mixed-use transit project by voiding its redevelopment agency's statutory obligation to make contractual pass-through payments to Los Angeles County. AB 921 would, to fund housing and infrastructure, extend the term of redevelopment projects an additional 25 years without a new finding of blight. AB 517 would exempt City of Berkeley redevelopment activities from project extension blight requirements to fund low-income housing. To some degree all such legislation has implications for the use of eminent domain.

The County has opposed these and other efforts to weaken AB 1290 over the years. In fact, its State Legislative Agenda contains long-standing policies to: support legislation which continues or extends the redevelopment law reforms established in AB 1290, support measures to strengthen the blight findings requirement to prevent redevelopment abuse, and support measures to close loop-holes that allow agencies to extend the life of projects beyond the statutory time frames established in AB 1290.

Thus, the issue in California is less the unlimited use of eminent domain to further private interests, than the pressures working to weaken AB 1290's protections related to blight, project size, and duration. The Senate Floor Analysis of AB 1290 recognized that the legislation by narrowing the definition of blight reduced authority to use eminent domain. While California redevelopment law does allow for the inclusion of non-blighted parcels, it is permitted only "if their inclusion is necessary for effective redevelopment and not primarily to obtain tax increment revenue without other substantial justification." The phrase "necessary for effective redevelopment", admittedly open to debate, reflects tension between private property rights and the expectation that redevelopment may demand land assembly.

Even before Kelo, cities and counties had the authority to condemn land within a redevelopment project area regardless of whether the parcels taken were blighted, provided the taking furthered redevelopment plan objectives which usually included economic development. Thus, the land taken need not be blighted and the immediate purpose might have nothing to do with curing blight. Nevertheless, taking non-blighted property for the purpose of redeveloping a blighted area is not a Kelo type taking. Kelo is significant because it affirmed a taking of non-blighted property unconnected with any redevelopment plan or purpose: it deemed advancing an economically superior use *in itself* a sufficient public purpose to justify the taking. Kelo has, however, triggered a widespread reappraisal of what kind of public benefit ought to be shown to permit the taking of private property.

Legislative Response to Kelo:

In this sense, many attempts to deal with Kelo are well intentioned, but they do not address the continuing efforts to redefine blight and extend project life. For example, in response to the U.S. Supreme Court decision, a number of bills have been introduced at the State level limiting, and in some cases eliminating, the use of eminent domain, but they do not deal with blight. Federal legislation is targeted specifically at limiting the use of eminent domain to public purposes.

A summary of the bills seeking to remedy Kelo and their potential impact on the Community Development Commission's (CDC) redevelopment activities follows.

Pending State Legislation

Assembly Constitutional Amendment 22 (ACA 22) and Senate Constitutional Amendment 15 (SCA 15) would prohibit private property from being taken for private use. They would restrict the right of local governments to use eminent domain proceedings by requiring that property taken under eminent domain must be for a stated public use, and can be taken only after an independent judicial determination that no reasonable alternative exists. The proposed constitutional amendments also provide that the property taken under eminent domain must be owned and occupied by the condemner (or entities that are regulated by the Public Utilities Commission) and must be used only for the stated public purpose. In the future, if the property ceases to be used for that purpose, it must be offered to the original owner or his/her heirs for the amount of compensation originally received or the property's new fair market value, whichever is less. Both Constitutional Amendments were introduced on July 14, 2005, and no hearing date has been set.

According to the Community Development Commission, ACA 22 and SCA 15 would severely hamper its redevelopment efforts. To make a project viable, CDC will often purchase property and sell or transfer it to a private owner with an agreement to develop and manage the property. CDC often writes down the cost of the land in order to make projects financially feasible and to stimulate private investment that would otherwise not occur. Although CDC has not used eminent domain for existing redevelopment projects, the possibility of its use often helps expedite negotiations with private owners who may be seeking an unjustified price for a property because they are aware of CDC's need to acquire it for a project. Pursuant to state law, CDC pays fair market value for the properties it acquires and offers substantial relocation assistance.

CDC only conducts these types of acquisitions in designated redevelopment areas that are afflicted by urban blight as determined by State law and the Board of Supervisors. Properties targeted for acquisition by CDC have included those

owned by absentee slumlords, contaminated properties, and properties that have become a public nuisance.

CDC indicates that ACA 22 and SCA 15 would effectively terminate its current proposed West Altadena redevelopment activities and would effectively cripple the planned Whiteside Redevelopment Area, and any other future redevelopment activities throughout the County. The Lincoln Crossing project in West Altadena is a 22-acre mixed-use development whose five-acre first phase is currently under construction. The project has an approximately seven-year build out with significant land assembly required. Additionally, CDC has successfully acquired and cleared blighted properties for future development at Windsor and Woodbury.

The unincorporated Whiteside community to the east of the County/University of Southern California General Hospital complex had a preliminary redevelopment plan approved by the Regional Planning Commission and Board of Supervisors earlier this year. The redevelopment plan adoption process is continuing. The Whiteside area is characterized by severely blighted properties some of which have a high probability of having contaminated soil and other environmental issues. The proposed Whiteside redevelopment area provides an opportunity for participation in future bio-tech projects.

AB 590 would establish that, for the exercise of eminent domain, "public use" does not include the taking or damaging of property for private use including, but not limited to, the condemnation of non-blighted property for private business development. AB 590 was amended on July 13, 2005 to deal with the subject of eminent domain. The bill is in the house of origin with no hearing scheduled.

CDC indicates that it purchases and sells or transfers property to a private owner for private business development. This bill would effectively terminate CDC's current proposed West Altadena redevelopment activities and Whiteside Redevelopment Area, and any other future redevelopment activities throughout the County.

Pending Federal Legislation

H.R. 3083 and S.1313 stipulate that eminent domain can only be employed for a public use and the term "public use" excludes economic development. Further, the bills would apply to all exercise of eminent domain powers by the Federal Government and all exercise of eminent domain powers by State and local governments through the use of Federal funds. H.R. 3083 was referred to the House Judiciary Committee on June 28, 2005. S. 1313 was referred to the Senate Judiciary Committee on June 27, 2005. Neither is set for a hearing.

CDC indicates that, although its redevelopment efforts are aimed at the elimination of blight and not at economic development, this legislation does not define what activities constitute economic development.

H.R. 3315 and H.R. 3135 would amend the Housing and Community Development Act of 1974 to withhold Community Development Block Grant (CDBG) funds from states and communities that do not prohibit the use of the power of eminent domain that involves taking of property from private owners for commercial and economic development purposes and transfer of the property to other private persons. Additionally, local agencies will be required to adopt and enforce laws and regulations prohibiting the use of eminent domain in all projects that involve transfer of property to a private party. H.R. 3315 was referred to the Committee on Financial Services on July 14 and H.R. 3135 was introduced on June 30, 2005.

CDC indicates that these bills will cripple its redevelopment efforts to improve blighted communities. As discussed above, CDC will often purchase property and sell or transfer the property to a private owner to develop and manage the property. CDC will no longer be able to use the possibility of eminent domain to acquire properties geared toward commercial and economic development and it will also have to revamp its eminent domain policies in order to continue to receive CDBG funds. This legislation will also negatively impact our West Altadena and Whiteside Redevelopment Area activities and virtually eliminate any future phases for these projects.

In addition, an amendment to **H.R. 3058**, the Federal Fiscal Year 2006 Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies Appropriations Bill, "bars the use of any of the funds made available in the bill from being used to enforce the judgment of the United States Supreme Court in the case of Kelo v. New London." County Counsel advises that it appears to be the intent of the amendment to prevent any Federal funds from being used to pay for any infrastructure improvements which are part of, or which would benefit a private development for which land was acquired by eminent domain. County Counsel also indicates that is questionable as to whether and/or how the language of the amendment will accomplish this purpose.

Summary

The Kelo case does not alter eminent domain in California because Kelo is primarily related to condemnation of private property for economic development unrelated to blight. California law provides substantial protection against Kelo because it generally requires that local government use of eminent domain be

related to a finding of blight although cities and counties have the authority to condemn land within a redevelopment area even if the property is not blighted if the taking furthers the objectives of a redevelopment plan.

Statutory protections against indiscriminate use of eminent domain contained in AB 1290 link narrowing the definition of blight to a reduction in the use of eminent domain and in project size and life. Any weakening in the definition of blight and attempts to alter project size or extend project life may increase the likelihood of eminent domain use. Recent attempts to redefine blighted areas are not encouraging. The County should continue to oppose these efforts and to support tightening of the definitions of blight outlined in AB 1290, limiting the use of eminent domain in non-blighted areas, and requiring a finding of blight for projects where an agency seeks to reinstate or extend the time limit for the use of eminent domain.

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MAL:TT:ib

c: Executive Officer, Board of Supervisors
Community Development Commission